W. Scott Randolph
Director – Regulatory Affairs

Verizon Communications
1300 I Street
Suite 500E
Washington, DC 20005

Phone: 202 515-2530
Fax: 202 336-7922
srandolph@verizon.com

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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Ex Parte: **Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers – CC Docket No. 01-338; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 - CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability – CC Docket No. 98-147**

Dear Ms. Dortch:

In recent meetings with the staff of the Wireline Competition Bureau and the Office of Engineering and Technology, Verizon discussed why dedicated transport and high capacity loops should not be subject to the unbundling rules where an ILEC has been granted pricing flexibility for special access services. Questions were raised in the meeting as to the relationship between the *Pricing Flexibility Order* and the impairment analysis.

In its *Pricing Flexibility Order*, the Commission sought to eliminate "counter-productive" regulation by relaxing oversight of the ILECs' access rates in markets with significant facilities-based competitive entry.[1] To this end, the Commission adopted strict, market-based triggers, which grant pricing relief only upon a demonstration that facilities-based competitors have collocated either in a large number of wire centers or in wire centers accounting for a substantial portion of the ILEC's special access revenue in an MSA.[2] Notably, the Commission found that its pricing flexibility rules assure that facilities-based "competitors have established a significant market present in the provision of the services" and that, as a result, "rates [for ILEC special access services] are just and reasonable."[3] Upon review, the D.C. Circuit endorsed this conclusion, stating that the Commission's triggers "reasonably serve as a measure of competition in a given market and predictor of competitive constraints on future LEC behavior."[4]

Given the existence of this judicially approved, granular approach to analyzing competition in specific geographic markets, Verizon and other ILECs have demonstrated that a grant of pricing flexibility in a given MSA should preclude a finding of impairment with respect to the UNE equivalents of special access services (unbundled dedicated transport and high-capacity loops). We understand, however, that some parties have

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1 *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominate Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Purposed Rulemaking, 14 FCC Rcd 14221, ¶ 19 (1999) ("Pricing Flexibility Order") *aff'd, WorldCom, Inc. et al. v. FCC et al.*, 238 F.3d 449 (D.C. Cir. 2001).

2 *See* 47 C.F.R. §§ 69.709(c), 69.711.

3 Pricing Flexibility Order, ¶ 69.

4 *WorldCom v. FCC*, 238 F.3d at 459 .

argued that basing a non-impairment finding on the grant of pricing flexibility is circular because the Commission purportedly relied on the availability of UNEs in establishing the conditions under which pricing flexibility would be granted. That is incorrect.

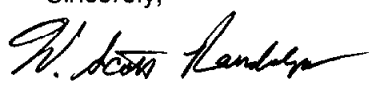
The Commission consciously did not predicate its decision to afford ILECs pricing flexibility on the existence of UNEs. Rather, the Commission purposefully crafted the pricing flexibility triggers to capture only true facilities-based competition, in order to ensure "irreversible entry"[5] and to "prevent exclusionary pricing behavior so as to safeguard the development of competition."[6] Indeed, the Commission flatly rejected proposals to incorporate or otherwise reference UNEs in the competitive triggers. As the Commission explained, "[w]e find that collocation-based standards provide a better basis for Phase I triggers than standards based on availability of UNEs and resale .... [A] competitor's use of UNEs or resale does not indicate that it has sunk investment in facilities in the MSA, because services provided over UNEs or through resale make use of the incumbent's facilities."[7]

There is, in short, no basis for claims that the continued availability of UNEs in any way underlies the Commission's pricing flexibility framework. In fact, in response to concerns that potential anticompetitive conduct could result from pricing flexibility, the Commission did not rely on or even cite the existence of UNEs as a backstop. Rather, the Commission explained that the Section 208 complaint process was available to address any allegations of discriminatory behavior.[8]

In the end, Triennial Review record demonstrates that there are ample non-ILEC alternatives to unbundled dedicated transport and high-capacity loops in many locations, precluding any generalized finding of impairment. Even aside from that evidence, however, the availability of the ILECs' tariffed special access services and competitive offerings in MSAs where pricing flexibility has been granted conclusively demonstrates that competition will not be impaired without access to these UNEs in those locations. Accordingly, using the grant of pricing flexibility as a trigger for de-listing unbundled dedicated transport and high-capacity loops is not only consistent with the *Pricing Flexibility Order*, but is directly responsive to the D.C. Circuit's admonition to undertake a more granular impairment analysis.

Please associate this notification with the record in the proceedings indicated above. If you have any questions regarding this matter, please call me at (202) 515-2530.

Sincerely,



W. Scott Randolph

cc: Tom Navin
Rob Tanner
Jeremy Miller
Claudia Pabo
Ian Dillner
Julie Veach
Mike Engel
Shanti Gupta
Jerry Stanshine

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5 Pricing Flexibility Order, ¶ 80.

6 *Id.*, ¶ 79.

7 *Id.*, ¶ 88.

8 *See Pricing Flexibility Order*, ¶¶ 41 ("IXCs may file complaints under section 208 of the Act, should they believe that such unreasonable discrimination has occurred"); 83 ("To the extent that an incumbent LEC attempts to use pricing flexibility in a predatory manner, aggrieved parties may pursue remedies under the antitrust laws or before this Commission pursuant to section 208 of the Act.").